JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 1143

CARLE & MONTANARI, INC.,

Petitioner,

against

JOHN W. McGRATH CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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JOHN W. McGRATH CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit.

Opinions Below

The opinion of the Court of Appeals affirming the judgment of the District Court, printed in the Appendix hereto, has not yet been officially reported. The opinion of the District Court, also printed in the Appendix, is reported at 275 F. Supp. 76.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S. Code, Sec. 1254(1).

The ground upon which the jurisdiction of this Court is invoked is that the Court of Appeals has decided a federal

question in a way in conflict with the applicable decisions of this Court.

The date of the judgment of the Court of Appeals for the Second Circuit sought to be reviewed and the date of its entry is December 13, 1967 (R. 64). Petitioner's petition for rehearing was denied on January 8, 1968, and an order thereon was entered on the same date (R. 73, 75).

The Questions Presented

1. Whether the decision of the Court of Appeals, holding that a bill of lading clause limiting the liability of a stevedore tort-feasor by fixing the value of the goods in the amount of the carrier's limited liability of $500 per package is not to be strictly construed, is in conflict with the decision of this Court in *Herd & Co.* v. *Krawill Machinery Corp.* (1959) 359 U.S. 297, 305, holding that "contracts purporting to grant immunity from, or *limitation of, liability* must be strictly construed * * *."

2. Whether there is any distinction, in the application of the rule of strict construction prescribed by this Court in the *Herd* case, *supra*, between a bill of lading clause that limits liability, by fixing the value of the goods in the amount of the carrier's limited liability of $500, and a clause granting immunity.

Statute Involved

The statute involved is Section 4(5) of the U.S. Carriage of Goods by Sea Act, 1936 (46 U.S. Code, Section 1304(5)), hereafter referred to as COGSA, the relevant portions of which provide:

> "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in

an amount exceeding $500 per package * * *, or in case of goods not shipped in packages, per customary freight unit, * * * unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading."

Statement

This is an action in admiralty against a negligent stevedore for damage to cargo. The District Court had jurisdiction under 28 U.S. Code, Sec. 1333(1). The decision of the District Court (R. 49-55) was on a motion for summary judgment (R. 33-36) presented on stipulated facts (R. 29-32). The sole question presented was whether the ocean carrier's bill of lading validity limited the liability of the stevedore to $500 per package.

On August 3, 1965, the carrier received on board its vessel EXPORT CHALLENGER at Genoa, a case of machinery for transportation to New York and delivery there to petitioner, pursuant to such terms of the bill of lading (R. 41-42) as were valid under COGSA.

The respondent, an independent contractor, agreed with the carrier to perform the stevedoring services required to discharge the cargo at New York (R. 43-48). Respondent stipulated that the damage occurred during discharge at New York when it negligently caused the case of machinery to fall from the ship's tackle, the resulting damage to petitioner being substantially in excess of the $500 limitation (R. 30).

The District Court awarded petitioner judgment for only $500, the amount of the carrier's limited liability for a "package". That Court rejected petitioner's contention that the carrier's bill of lading clause 1(a) (R. 42), is invalid because of the stevedore's admission of negligence and the absence of any provision in the bill of lading explicitly giving the stevedore the benefit of that limitation,

even if negligent (R. 54-55). This contention is in conformity with this Court's ruling that such contracts must be strictly construed.

The appeal was argued on December 12, 1967, and a *per curiam* opinion was filed the following day, as follows:

> "The judgment of the District Court is affirmed on the opinion of Judge Bonsal reported at — F. Supp. — SDNY, 1967" (R. 63).

Reason for Granting the Writ

The decision of the lower courts, giving the stevedore the benefit of the carrier's limited liability is in direct conflict with the rule prescribed by this Court in *Herd & Co.* v. *Krawill Machinery Corp., supra* (1959) 359 U.S. 297, and prior cases.

The *Herd* case, *supra,* presented for the first time in this Court the question of whether a stevedore who had negligently damaged cargo, was entitled to limit his liability to the cargo owner to $500 per package, the limitation specified in Section 4(5) of COGSA (46 U.S.C., Secs. 1304(5)), and in the carrier's bill of lading contract with the shipper. This Court held that neither the said Act nor the carrier's bill of lading entitled the stevedore to limit his liability.

The stevedore's contention in the *Herd* case was based upon the decision of the Court of Appeals for the Fifth Circuit in *A. M. Collins & Co.* v. *Panama Railroad Company,* 197 F. (2d) 893 (5 Cir., 1952) that, as the stevedore was doing the carrier's work, the former was entitled to all of the latter's statutory and contractual benefits.

In rejecting the stevedore's contention in the *Collins* case, this Court reviewed the law relating to the tort liability of an agent, stating (359 U.S., pp. 304-305):

> "In Brady v. Roosevelt S.S. Co., 317 U.S., at 580-581, this Court said that 'The liability of an agent for his own negligence has long been imbedded in the

> law,' that 'withdrawal of the right to sue the agent for his torts would result at times in a substantial dilution of the rights of claimants,' and that withdrawal of that right would be 'such a basic change in one of the fundamentals of the law of agency [as] should hardly be left to conjecture'. This Court has several times held that an agent's only shield from liability 'for conduct harmful to the plaintiff * * *' is a constitutional rule of law that exonerates him'. Sloan Shipyards Corp. v. Emergency Fleet Corp., 258 U.S., at 567; Brady v. Roosevelt S.S. Co., 317 U.S., at 584. Any such rule of law, being in derogation of the common law, must be strictly construed, for '[n]o statute is to be construed as altering the common law farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express'. Shaw v. Railroad Co., 101 U.S. 557, 565; see Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 437."

Then, dealing with the precise point presented by the within petition, this Court said (p. 305):

> "Similarly, contracts purporting to grant immunity from, or *limitation of, liability must be strictly construed* and limited to intended beneficiaries, for they 'are not to be applied to alter familiar rules visiting liability upon a tort feasor *for the consequences of his negligence, unless the clarity of the language* used expresses *such* to be the understanding of the contracting parties'. Boston Metals Co. v. The Winding Gulf, 349 U.S. 122, 123-124 (concurring opinion)." (Italics supplied.)

The District Court, despite the stevedore's admitted negligence, and in disregard of this Court's rule of strict interpretation, quoted above, held that the stevedore was an intended beneficiary of the carrier's $500 limitation of liability, as appears in the following excerpt from the opinion:

> "Plaintiff also relies upon cases dealing with contractual provisions purporting to exonerate a party from liability for negligence, and argues that the stevedore is not entitled to limit its liability

> because the bill of lading, which must be strictly construed against the stevedore, does not specifically mention negligence.
>
> However, a contract which fixes the value of goods accepted for shipment and thereby limits liability for damage to the goods, is not a contract exonerating a negligent party from liability" (R. 54).

It will be observed that, although this Court in the *Herd* case, *supra,* made no distinction between "exoneration" and "limitation" clauses in prescribing the tests of "clarity of language" and "strict construction", the District Court ruled that the COGSA $500 limitation clause is not to be so construed.

The Court of Appeals by its affirmance, with no statement other than that the judgment was affirmed on the opinion of the District Court, tacitly approved the latter's refusal to construe the bill of lading in accordance with the rule prescribed by this Court.

In the *Herd* case, *supra,* this Court held that Section 4(5) of COGSA, as well as the bill of lading clause, provided for *limitations of liability.* At page 300 of the opinion in the *Herd* case, *supra,* reference is made to the liability limiting provisions of COGSA and the bill of lading; and at page 302, in referring to the foregoing provisions of the statute and lading, said:

> "There is, thus, nothing in those provisions to indicate that the contracting parties intended to *limit the liability* of stevedores or other agents of the carrier for damages caused by their negligence." (Italics supplied.)

The language of bill of lading clause 17 in the present case (R. 42) is less favorable to the stevedore, in respect of limiting its liability, than that contained in clause 30 of the bill of lading, printed in the opinion of the Court of Appeals in the *Herd* case (256 F. (2d) 946, at p. 948).

As the language of Section 4(5) of COGSA, i.e., that a carrier's liability shall not be in "an amount exceeding $500.", are words of limitation, (*Stirnimann* v. *San Diego*, 148 F. (2d) 141, 143 (2 Cir., 1945); *Pan-Am Trade & Credit Corp.* v. *The Campfire*, 156 F. (2d) 603, 605-606 (2 Cir., 1946); cer. den. 329 U.S. 774), the claim of the stevedore should be considered only on the basis of a limitation of liability clause.

The District Court's error lies in its belief that only exoneration clauses are subject to the rule of strict construction. The language of the clause (Section 4(5) of COGSA) which the District Court held is not to be strictly construed, viz.,

> "which fixes the value of goods accepted for shipment and thereby limits liability for damage to the goods,"

is a paraphrase of the definition of a *limitation clause* in *Ansaldo San Giorgio I.* v. *Rheinstrom Bros. Co.* (1934) 294 U.S. 494, viz.,

> "Two so-called valuation clauses have been in frequent use. One is a *true limitation* agreement. It recites that a sum named in the bill of lading *is the agreed value of the goods,* or their value per unit or per package, in the absence of the shipper's declaration of a higher value; that the rate is fixed with reference to the specified value, and if a greater be declared a higher rate will apply; that in consideration of the rate to be charged, the carrier's liability for loss or damage *shall be limited to the stipulated value.* * * * The damages are computed in the usual way without reference to the stipulation, but if when so computed they exceed the agreed limit of value, no recovery of the excess may be had. * * *
>
> The other is a true valuation clause. It is to the effect that in event of loss or damage for which the carrier is liable, the same shall be computed on the basis of the value of the goods at the place and time of shipment." (pp. 496-497.) (Italics supplied.)

As this Court held in the *Rheinstrom* case, *supra,* that a clause fixing an agreed value and limiting liability to that amount is a "true limitation clause" (p. 496), and as this Court held further in the *Herd* case, *supra,* that both exoneration and limitation clauses are subject to the rule of strict construction, the decision of the District Court, and the approval of that decision by the Court of Appeals without a reasoned opinion, are squarely in conflict with the rule stated by this Court in the *Herd* case, that

> "* * * contracts purporting to grant immunity from, or limitation of, liability must be strictly construed * * *" (p. 305).

Assuming, *arguendo,* that a third-party beneficiary contract in favor of the stevedore is clearly expressed in clause 1(a) of the bill of lading (R. 42), the carrier's limitation of liability to $500 would not be valid since the clause does not explicitly specify that it shall apply, even if the stevedore is negligent—which result would have obtained had the lower courts subjected clause 17 of the bill of lading to a strict construction.

A third question, related to the two questions hereinbefore specified on page 2, not presented in the within petition, but which would become material should petitioner's application for a writ be granted, is whether clause 1(a) of the bill of lading (R. 42), explicitly and clearly limits the stevedore's liability, *even in the event of the latter's negligence.*

As appears in the petition for rehearing, filed in the Court of Appeals (R. 66-71), there is no reference to "negligence", direct or indirect, in clause 1(a), or any of the other clauses in the bill of lading.

The present case is the first decision since this Court's pronouncement in the *Herd* case, *supra,* that a beneficiary clause in favor of a stevedore tort-feasor is to be given

strict construction, in which a lower court has sustained a stevedore's contention that it is entitled to the carrier's bill of lading benefits. And, in so ruling, the lower court disregarded this Court's rule of strict construction, referred to above, by drawing an erroneous distinction between an exoneration and a limitation of liability clause.

If the rulings of the two lower courts in this case are not vacated, negligent stevedores, where beneficiary clauses contain no provision that they shall apply even if the stevedore is negligent, will have secured important financial benefits.

This is particularly significant in relation to losses of cargo carried in containers due to negligence of stevedores. In containerized cargo, a comparatively new concept in ocean freight transportation, a container load can consist of several hundred packages. Under the contention of ocean carriers that their liability is but $500 for the entire contents of a container, a negligent stevedore could limit his liability to that sum, regardless of the number of damaged packages within the container.

In the language of this Court in the *Herd* case, *supra*, a decision granting a negligent agent protection against full liability would be a situation

> "* * * in derogation of the common law, (which) must be strictly construed * * *" (359 U.S. at p. 304).

Because of the extensive stevedoring operations in this country, many individuals will be affected by the decision below, which, we submit, constitutes an issue of law of considerable commercial importance.

As stevedoring interests will gain the $500 limitation by reason of the tacit approval by the Court of Appeals of the District Court's opinion, which disregards the rule of interpretation prescribed by this Court, we submit that a question of paramount public interest is presented.

No authority is required to be cited for the fundamental rule that decisions of this Court are not to be disregarded by inferior courts. In commenting upon that subject, Judge Hastie, writing for the Court of Appeals for the Third Circuit, in the recent case of *Scott* v. *Eastern Air Lines,* not officially reported; reported in 10 Avi. 17,179, at p. 17,181, said:

> "Maritime law is national law and its principles should, to the best of judicial ability, be recognized and applied uniformly. While an inferior court is always obligated to conform its judgments to the law as found or declared by the Supreme Court, the national character of maritime law underscores the need for such conformity in this area."

Conclusion

Because the decisions of the Court of Appeals and the District Court are in direct conflict with the decision of this court in *Herd & Co.* v. *Krawill Machinery Corp., supra* (359 U.S. 297 (1959)), it is respectfully submitted that a writ of certiorari should be granted to correct the plain error of the lower courts, thereby clarifying and restoring uniformity of law in respect of bill of lading beneficiary contracts relating to negligent stevedores.

Dated: New York, N. Y.,
February 21, 1968.

Respectfully submitted,

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Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CARLE & MONTANARI, INC.,

Plaintiff,

against

AMERICAN EXPORT ISBRANDTSEN LINES, INC., and JOHN W. McGRATH CORPORATION,

Defendants.

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John W. McGrath Corporation,
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BONSAL, *D.J.*

Plaintiff, the consignee and owner of a shipment consisting of one case containing a machine described as a Chocolate Roller Refiner, instituted this admiralty action on February 16, 1966 seeking to recover from the defendant carrier, American Export Isbrandtsen Lines, Inc. (the carrier), and the defendant stevedore, John W. McGrath Corporation (the stevedore), for damages to the shipment. All material facts have been stipulated from which it appears that on or about August 3, 1965 the case containing the machine was loaded on board the S.S. Export Challenger in Genoa, Italy and the bill of lading was issued therefor. The shipment arrived in the Port of New York on or about August 13, 1965 and, while the cargo was being unloaded by the stevedore, the case containing the machine fell from, or was dropped from, the ship's gear and was damaged as a consequence of the negligence of the stevedore. It is further stipulated that the full amount of plaintiff's damages is $7,000, and that the liability of the carrier is limited to $500 pursuant to 46 U.S.C. § 1304(5) and the bill of lading, and that the sole issue to be decided by the court is whether the liability of the stevedore is also limited to $500 under the bill of lading. Plaintiff moves for summary judgment against the stevedore for $7,000, the full amount of its damages.*

Plaintiff contends that the stevedore is liable for the full amount of its damages, while the stevedore and the carrier contend that under the bill of lading, the stevedore's liability is limited to $500. The parties have stipulated that if plaintiff's contention is sustained, a final judgment may be entered against the stevedore for $7,000, and

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*Since all material facts have been stipulated by the parties, the issue of whether the stevedore's liability is limited to $500 can be decided on motion for summary judgment. Compare *Cabot Corp.* v. *SS Mormacscan*, 235 F. Supp. 845 (S.D.N.Y. 1964).

if the stevedore's contention is sustained, a final judgment may be entered against the stevedore for $500. Excellent briefs have been submitted to assist the court in reaching its decision.

Clauses 1(a) and 17 of the bill of lading read in relevant part as follows:

> '1.(a) . . . The terms of this bill of lading constitute the contract of carriage, which is between the Shipper, Consignee and owner of the goods, and the owner or demise charterer of the vessel designated to carry the goods. It is understood and agreed that, *other than said shipowner or demise charterer,* no person, firm or corporation or other legal entity whatsoever (including the Master, officers and crew of the vessel, *all agents and all stevedores and other independent contractors whatsoever*) is, or shall be deemed to be liable with respect to the goods *as carrier, bailee or otherwise howsoever,* in contract or in tort. If, however, it shall be adjudged that any *other than said shipowner or demise charterer is carrier or bailee of the goods or under any responsibility with respect thereto,* all limitations of and exonerations from liability provided by law or by the terms hereof shall be available to such other. In contracting for the foregoing exemptions, limitations and exonerations from liability, the Carrier is acting as agent and trustee for the other above-mentioned. (Emphasis supplied.)
>
> '17. In case of any loss or damage to or in connection with goods exceeding in actual value the equivalent of $500 lawful money of the United States, per package, or, in case of goods not shipped in packages, per shipping unit, the value of the goods shall be deemed to be $500 per package or per ship-

> ping unit. The Carrier's liability, if any shall be determined on the basis of a value of $500 per package or per shipping unit . . . unless the nature of the goods and a valuation higher than $500 per package or shipping unit shall have been declared in writing by the shipper upon delivery to the Carrier and inserted in this bill of lading and extra freight paid.'

The parties to a bill of lading may extend a contractual benefit to a third party by clearly expressing their intent to do so. Herd & Co. v. Krawill Machinery Corp., 359 U.S. 297 (1959); Cabot Corp. v. SS Mormacscan, supra; Virgin Islands Corp. v. Merwin Lighterage Co., 177 F. Supp. 810 (D.V.I., 1959). Therefore, if clause 1(a) of the bill of lading expresses an intent to extend the benefit of the $500 per package limitation of liability to the stevedore, then the stevedore's liability must be so limited.

In interpreting clause 1(a), the underlined words in the third sentence, 'other than said shipowners or demise charterer is carrier or bailee of the goods or under any responsibility with respect thereto,' must be read together with the second sentence which, in excluding persons other than the shipowner or demise charterer, specifically mentions stevedores in the exclusion. Reading the two sentences together, it is clear that the bill of lading seeks to exclude stevedores from liability, in the second sentence, and to provide, in the third sentence, that where, as here, the stevedore is liable, its liability is limited to $500 as provided in clause 17 of the bill of lading. The intent of the parties to the bill of lading to extend the limitation of liability to the stevedore is adequately expressed therein. Consequently, the court holds that under the bill of lading the stevedore is entitled to the benefit of the $500 per package limitation of liability.

Plaintiff argues that under the Supreme Court's decision in Herd & Co. v. Krawill Machinery Corp., supra, and

the decision in Virgin Islands Corp. v. Merwin Lighterage Co., supra, the bill of lading does not entitle the stevedore to limit its liability. In Herd there was nothing in the bill of lading to indicate that the stevedore's liability was intended to be limited and the Supreme Court held that in the absence of such an expression of intent, the stevedore's liability was not limited under 46 U.S.C. § 1304(5) or under the bill of lading. In Virgin Islands Corp. the cargo was damaged on a lighter after it had been unloaded from the ship. As Judge Maris pointed out, if the limitation of liability in the bill of lading covered damage on the lighter, 'the limitation of liability provisions . . . [would extend] even to carriers and/or bailees handling the cargo by land.' 177 F. Supp. at 815. The parties here have stipulated that the cargo was damaged when 'it fell or was dropped from the ship's gear' as it was being unloaded. In addition, in Virgin Islands Corp., the provision in the bill of lading relied upon by the lighterage company made no mention of stevedores or third parties such as the lighterage company.* Here the bill of lading refers specifically

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*The bill of lading provision in Virgin Islands Corp. reads as follows:

> 'If the ship is not owned by or chartered by demise to Alcoa Steamship Company, Inc. (as may be the case notwithstanding anything that appears to the contrary) this bill of lading shall take effect only as a contract with the owner or demise charterer, as the case may be, as principal, made through the agency of Alcoa Steamship Company, Inc. which acts as agent only and shall be under no personal liability whatsoever in respect thereof. If, however, it shall be adjudged that any other than the owner or demise charterer is carrier and/or bailee of the goods all limitations of and exonerations from liability provided by law or by the terms hereof shall be available to such other.'

'Carrier' was defined in the bill of lading to include, 'the ship, her owner, master, operator, demise charterer, and if bound hereby the time charterer, and any substituted carrier, whether the owner, operator, charterer, or master shall be acting as carrier or bailee.'

to stevedores and states that, 'In contracting for the * * * limitations * * * [of] liability, the Carrier is acting as agent and trustee for the other above mentioned.'

Plaintiff also relies upon cases dealing with contractual provisions purporting to exonerate a party from liability for negligence, and argues that the stevedore is not entitled to limit its liability because the bill of lading, which must be strictly construed against the stevedore, does not specifically mention negligence. However, a contract which fixes the value of goods accepted for shipment and thereby limits liability for damage to the goods, is not a contract exonerating a negligent party from liability. See, e.g., Ansaldo San Giorgio I v. Rheinstrom Brothers Co., 294 U.S. 494 (1935); Kansas City Southern Railway Co. v. Carl, 227 U.S. 639 (1913). If plaintiff wanted to avoid the $500 per package limitation of liability in the bill of lading, it could have declared a higher value and paid extra freight.

For the foregoing reasons, plaintiff's motion for summary judgment is denied. A final judgment may be entered for $500 against the defendant stevedore, John W. McGrath Corporation.

Settle order on notice.

Dated: New York, N.Y.,
September 25, 1967.

DUDLEY B. BONSAL,
U.S.D.J.

Opinion of the Court of Appeals on the Merits

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 229—September Term, 1967.

(Argued December 12, 1967—Decided December 13, 1697.)

Docket No. 31825

CARLE & MONTANARI, INC.,

Appellant,

v.

AMERICAN EXPORT ISBRANDTSEN LINES, INC. and JOHN W. McGRATH CORPORATION,

Appellees.

Appeal from a final judgment of the United States District Court for the Southern District of New York, Bonsal, J., entered in a suit for cargo damage holding a bill of lading extended a $500 per package limitaiton of liability to the stevedore.

Affirmed.

F. HERBERT PREM, New York, N.Y. (Bigham, Englar, Jones & Houston), for appellant.

M. E. DE ORCHIS, New York, N.Y. (Haight, Gardner, Poor & Havens), for appellee American Export Isbrandtsen Lines, Inc.

MARTIN J. McHUGH, New York, N.Y. (Joseph F. McGoldrick, James M. Leonard, of counsel), for appellee John W. McGrath Corporation.

PER CURIAM:

The judgment of the District Court is affirmed on the opinion of Judge Bonsal, reported at ———F. Supp. ——— S.D.N.Y. 1967).

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OCTOBER TERM, 1967

No. 1143

CARLE & MONTANARI, INC.,

Petitioner,

against

AMERICAN EXPORT ISBRANDTSEN LINES, INC.
and JOHN W. McGRATH CORPORATION,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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OCTOBER TERM, 1967

CARLE & MONTANARI, INC.,

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against

AMERICAN EXPORT ISBRANDTSEN LINES, INC. and JOHN W. McGRATH CORPORATION,

Respondents.*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents ask that this Court deny Petitioner's application for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Statement

This admiralty action sought to recover damages for certain cargo, a case of machinery, which had been shipped aboard the S.S. EXPORTCHALLENGER to New York City. Petitioner is the consignee of the cargo.

During the course of discharge at New York, Respondent McGrath negligently damaged the case.

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* Though the carrier, American Export Isbrandtsen Lines, Inc. was a party to all proceedings both in the District Court and in the Court of Appeals, the caption of the Petition for Certiorari lists only John W. McGrath Corporation as a Respondent. Respondents are unaware of the reason. No notice pursuant to Rule 21(6) has been served by Petitioner. This brief is filed by Respondents jointly.

Petitioner and Respondents entered into a stipulated set of facts setting forth the above. Petitioner sought to recover damages in excess of $500.00. Respondents claimed that petitioner's recovery was to be limited to $500.00—the "package limitation" under the bill of lading.

A motion for summary judgment was made, using the stipulated facts. The District Court granted Petitioner judgment in the amount of $500.00, applying the "package limitation" provisions of the bill of lading.

Petitioner appealed to the United States Court of Appeals for the Second Circuit.

The decision of the Lower Court was affirmed unanimously (p. 17, Petitioner's appendix).

Thereafter petitioner sought from the Court of Appeals a rehearing and a rehearing *en banc,* both of which were denied (pp. 9-10, *infra*).

The Facts

To the extent that the facts are relevant and significant, they will be found set forth in the opinion of the District Court (Judge Bonsal) on pages 12 through 16 of Petitioner's appendix.

The specific clauses of the bill of lading which bear upon the issues herein are also to be found in the District Court's opinion (pp. 13-14, Petitioner's appendix).

Argument

In respect to the disposition made of Petitioner's motion below for summary judgment, Petitioner contends that the District Court and the entire panel* of the Court of Ap-

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*As noted *infra*, the Petition for re-hearing *en banc* by the Court of Appeals was denied.

peals for the Second Circuit were in error. Petitioner bases this position upon its assertion that the result reached below is in contravention of the decision of this Court in *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U. S. 297.

Respondents, on the contrary, submit that there is no conflict whatsoever between the actions taken by the Courts below and the decision of this Court in the *Herd* case.

The facts pertaining to the instant action are not in dispute, having been the subject of a stipulation among the parties (there were three parties in the Court below, including the shipowner). The District Court and the Court of Appeals were concerned solely with the legal effect which those operative facts produced.

The parties were (and are) agreed that:

A. Damage was done to Petitioner's case of machinery.

B. The damage was occasioned by virtue of negligence on the part of Stevedore's employees.

C. The goods were in the course of shipment under a Bill of Lading issued by the Carrier, which Bill of Lading was submitted as an exhibit to the Courts below.

In the lower Courts, Petitioner espoused the views (1) that the principles of contract construction precluded any interpretation of the Bill of Lading which would permit to Stevedore the benefits of the package limitation and (2) that even were the writing to be so construed, decisional law denied to Stevedore the protection of a limited liability.

Now, apparently Petitioner has abandoned the former of these two views (Cf. p. 8—Petition) and relies solely upon the claim that the decisional law of this Court prohibits any extension of the so-called "package limitation"

for the benefit of a stevedore or other independent contractors retained by the shipowner to perform services for the goods.

The Shipper, of course, had the option of paying an adjusted freight rate and thus securing for itself the increased protection of a higher valuation (cf. p. 16—Petition). It did not choose to do so. This Court has uniformly held that where a carrier permits actual value to be declared and agreed upon by payment of a higher freight rate, at the Shipper's option, the Shipper (or his successor in interest) will be estopped from asserting a higher maximum value than that customarily contained in the bill of lading, *Hart* v. *Pennsylvania Railroad,* 112 U. S. 331; *Ansaldo San Giorgio I* v. *Rheinstrom Brothers Co.,* 294 U. S. 494; *Kansas City Southern Railway Co.* v. *Carl,* 227 U. S. 639.

In *Ansaldo San Giorgio I* v. *Rheinstrom* (quoted with elisions in the Petition), this Court said, of an optional valuation clause:

> "The damages are computed in the usual way without reference to the stipulation, but if when so computed they exceed the agreed limit of value, no recovery of the excess may be had. Such a stipulation, we have said, is not enforcible unless the shipper, for agreeing to such a limitation of the carrier's liability, receives a consideration consisting in the offer of a lower rate as against a higher rate offered for the service without such limitation; or, as has been said, the rate is tied to the release. Agreements of this kind are held to be reasonable and not offensive to the public policy against contracts relieving the carrier from its own negligence. *The agreement as to value, in consideration of carriage at the lower rate thus obtained, is held to estop the shipper from demanding damages in excess of the agreed value.*" (Emphasis supplied.) 294 U. S. 496, 497.

In *Kansas City Southern Railway Co.* v. *Carl, supra,* it was said:

> "Is the contract here involved one for exemption from liability for negligence and therefore forbidden? . . . A declared value by the shipper for the purpose of determining the applicable rate, when the rates are based upon valuation, is not an exemption from any part of its statutory or common-law liability. The right of the carrier to base rates upon value has been always regarded as just and reasonable. The principle that the compensation should bear a reasonable relation to the risk and responsibility assumed is the settled rule of the common law." 227 U. S. 639, 650.

And in *Hart* v. *Pennsylvania Railroad,* this Court observed:

> "The distinct ground of our decision in the case at bar is, that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations." 112 U. S. at p. 343.

In view of Petitioner's contention that the fact of Stevedore's negligence calls into play a rule of strict construction, assertedly fatal to the "package limitation" clause, it is noteworthy that, in both the *Hart* and *San Giorgio* cases, the claims made therein were bottomed on negligence.

In the *Herd* case (*Robert C. Herd & Co.* v. *Krawill Machinery Corp.,* 359 U. S. 297) upon which Petitioner

claims to rely, the damage was also occasioned by negligence (this time, stevedore's negligence).

True enough, the stevedore there was denied the protection of the "package limitation" clause, but only because the language of the Bill of Lading did not adequately encompass the stevedore within the scope of the clause.

For purposes of its petition, Petitioner does not dispute the conclusion of the lower Courts that the language in the Bill of Lading, in the case at bar, *does* include the Stevedore as a beneficiary.

The sole thrust of Petitioner's argument would, therefore, seem to be that, even conceding that the language of the Bill of Lading does establish a valuation (or "package limitation") which bears on claims made upon Stevedore, the *Herd* case denies the right of Stevedore to become such a beneficiary under any circumstances.

With specific reference to the position of a stevedore *vis-a-vis* claims made on behalf of cargo, this Court was careful to point out in *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U. S. 297:

> "We are unable to agree with that conclusion for we think it runs counter to a long-settled line of decisions of this Court. From its early history this Court has consistently held that an agent is liable for all damages caused by his negligence, *unless exonerated therefrom, in whole or in part, by a statute or a valid contract binding on the person damaged.* In Osborn v. Bank of the United States, 9 Wheat. 738, 843, it was said that an agent 'is responsible for his own act, to the full extent of the injury [caused thereby]'." (Emphasis supplied) 359 U. S. at p. 303.
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> "There is, thus, nothing in those provisions to indicate that the contracting parties intended to limit

> the liability of stevedores or other agents of the carrier for damages caused by their negligence. *If such had been a purpose of the contracting parties it must be presumed that they would in some way have expressed it in the contract.*" (Emphasis supplied) 359 U. S. at p. 302.

It is clear that this Court has never deviated from a clear recognition of the principles applicable to the case at bar:

1. A Bill of Lading clause offering a fixed ($500.00) valuation in exchange for the payment of a lower freight rate is valid and ethically sound.

2. The stevedore may enjoy the benefit of the "package limitation", if the parties express such intention in the writing.

The District Court quite correctly held that the settled law is that the parties to a bill of lading may agree that the value of goods is no more than $500.00 (in the absence of contrary arrangements) and that this valuation clause may be extended to a stevedore, provided the agreement so states. The District Court further held that this agreement did include the Stevedore as a beneficiary of this agreement.

Petitioner has failed to demonstrate any reason why such an agreement cannot be made. It does not, on this Petition, contest the conclusion of the District Court that the words of the writing did include the Stevedore.

The actions of the District Court and of the Court of Appeals are preeminently correct and should be sustained.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

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Order Denying Petition for Rehearing.

31825

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT.

CARLE & MONTANARI, INC.,

Plaintiff-Appellant,

v.

AMERICAN EXPORT ISBRANDTSEN LINES, INC., and JOHN W. MCGRATH CORPORATION,

Defendants-Appellees.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN
/s/ ROBERT P. ANDERSON
/s/ WILFRED FEINBERG, Judges

January 8, 1968

Order Denying Petition for Rehearing in Banc.

31825

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT.

CARLE & MONTANARI, INC.,

Plaintiff-Appellant,

v.

AMERICAN EXPORT ISBRANDTSEN LINES, INC., and JOHN W. McGRATH CORPORATION,

Defendants-Appellees.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ J. EDWARD LUMBARD
Chief Judge

January 8, 1968

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IN THE

Supreme Court of the United States

October Term, 1967

No. 1143

CARLE & MONTANARI, INC.,
Petitioner,

against

JOHN W. McGRATH CORPORATION,
Respondent.

PETITIONER'S REPLY BRIEF

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IN THE

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No. 1143

CARLE & MONTANARI, INC.,

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against

JOHN W. McGRATH CORPORATION,

Respondent.

PETITIONER'S REPLY BRIEF

The brief of respondent, McGrath (in which the American Export Line * has joined), avoids a discussion of the paramount question presented in the petition, *viz.*, whether the decisions of the lower courts giving the stevedore the

* Counsel for the carrier, American Export Isbrandtsen Lines, Inc., in a footnote (respondents' brief, p. 1), expresses lack of knowledge why the caption of the petition lists only stevedore, John W. McGrath, as a respondent.

The judgment of $500 awarded petitioner by the District Court was solely against the stevedore. No issue as to the liability of the carrier was presented in the Court of Appeals, which was stipulated to be $500 (R. 30), and petitioner's motion for summary judgment was directed against only the stevedore (R. 33).

The reason assigned by the carrier for the filing of a brief in the Court of Appeals was "its indirect but vital interest in the case". Therefore, its appellate court brief was that of an *amicus curiae*, although it failed to obtain leave to file same, as is required under Rule 19(b) of that Court. Similarly, in this Court, the carrier has not made application for leave to file as is provided in paragraph 1 of Rule 42.

benefit of the $500 limited liability is in direct conflict with the rule of strict interpretation prescribed for a negligent stevedore in *Herd & Co.* v. *Krawill Machinery Corp.* (1959), 359 U.S. 297—this Court's most recent decision upon the issue. The respect in which the lower courts disregarded the views of this Court in the *Herd* case is discussed at pages 4-8 of the petition.

In the *Herd* case, *supra,* this Court stated the rule as follows:

> "Similarly, contracts purporting to grant immunity from, or limitation of, liability must be strictly construed * * * for they 'are not to be applied to alter familiar rules visiting liability upon a tortfeasor for the consequences of his negligence, unless the clarity of the language used expresses such to be the understanding of the contracting parties.'"

As is stated in the petition (pp. 7-8), the District Court, despite the stevedore's admitted negligence, and the absence of any provision in the bill of lading absolving the stevedore from damage due to its negligence, erroneously held the $500 limitation provision to be a "contract which fixes the value of the goods * * * [and] is not a contract exonerating a negligent party from liability", and, therefore, is not required to be strictly construed.

As appears on pages 6 and 7 of the petition, the language of both Section 4(5) of COGSA (46 U.S. Code, Sec. 1304(5) and clause 17 of the bill of lading (R. 42), relating to the carrier's $500 liability, contains words of limitation. Similar language was held by this Court to be a "limitation agreement" in *Ansaldo San Giorgio I.* v. *Rheinstrom Bros. Co.* (1935), 294 U.S. 494, 497. The same construction was given Section 4(5) of COGSA by this Court in the *Herd* case, *supra,* and by the Court of Appeals below in *Stirnimann* v. *San Diego,* 148 F.(2d) 141, 143 (2 Cir., 1945), and *Pan-Am Trade & Credit Corp.* v. *The Campfire,* 156 F.(2d) 603, 605-606 (2 Cir., 1946); cert. den. 329 U.S. 774.

In lieu of replying to the issue presented in the petition, respondent's brief advances the following two irrelevant matters:

(1) that Section 4(5) of COGSA and clause 17 of the bill of lading are "agreed valuations" and not provisions limiting the stevedore's liability; and

(2) respondent seeks to equate decisions governing a common carrier's liability for negligence, where the bill of lading provides for calculation of damages based upon alternative freight rates (*Kansas City Southern Railway Co.* v. *Carl* (1913) 227 US 639, 650, and *Hart* v. *Pennsylvania Railroad,* (1884), 112 US 331, 343, cited at page 5 of respondent's brief), with contractual provisions governing a tort-feasor's liability which offer no choice of rates for alternative liability.

Disregarding the decisions in the *Herd, Stirnimann* and *Campfire* cases, *supra,* respondent, in reliance upon the District Court's erroneous construction that Section 4(5) of COGSA and clause 17 of the bill of lading (R. 42) are not contracts "exonerating a negligent party from liability" (R. 54), asks this Court to deny petitioner's application for a writ, upon the fallacious contention that the aforementioned $500 limitation clauses are "valuations" (respondent's brief, p. 7).

The second untenable position advanced by respondent (brief, pp. 4-6), is that the decisions of this Court in *Hart* v. *Pennsylvania Railroad, supra,* and *Kansas City Southern Railway Co.* v. *Carl, supra,* are pertinent to the issue of the extent of the stevedore's liability herein because the carriers' bill of lading limitation of liability provisions in those cases, were held to be valid, despite the circumstance that "the claims made therein were bottomed on negligence" (brief, p. 5).

It is true that, in respect of common carriers, courts have declared that it is not against public policy for such carriers to limit their liability where they offer alternative

freight rates. However, the liability of stevedores and other agents of carriers are governed by the law of torts and they are liable, without limitation, for damage resulting from negligence, unless the contract explicitly specifies that the limitation shall apply *despite such negligence.*

Herd & Co. v. *Krawill Machinery Corp.* (1959), 359 U.S. 297, 304-305;
Van Dyke Prods. v. *Eastman Kodak Co.*, 12 N.Y. 2d 301, 304-305 (1963);
Boll v. *Sharp & Dohme*, 281 App. Div. 568, 570 (1953).

Conclusion

Because of the aforementioned errors of the District Court, approved by the Court of Appeals, in disregarding this Court's ruling in the *Herd* case, *supra,* it is submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

F. Herbert Prem,
Counsel for Petitioner.